United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPELLANT'S BRIEF

IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

883

No. 17,977

MAURICE B. LYLES,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

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QUESTIONS PRESENTED

1. Whether the Trial Court erred in refusing to permit evidence showing the defendant did not know whether the drug had been legally imported, or whether it was furnished him from a properly stamped container.

2. Whether the Trial Court erred in its charge to the jury in explaining the history and purpose of the narcotics statute, and by so doing completely nullified the instruction that use of drugs, per se, was not illegal.

3. Whether the Court erred in failing to strike testimony which indicated that possession alone was illegal, and that defendant was known to one of the Government witnesses as a dealer prior to the offenses involved herein.

4. Whether the rebuttal testimony of the Government constituted reversible error in disclosing for the first time a prior sale of narcotics by defendant not involved herein.

5. Whether the Court should have directed a verdict of acquittal because the Government failed to prove that defendant was willing to sell narcotics to anyone who asked for it.

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment and commitment of defendant of the United States District Court for the District of Columbia filed June 14, 1963, and is reviewable by this Court pursuant to Title 28, Section 1291, of the United States Code.

STATEMENT OF FACTS

Defendant was convicted on each of nine counts under the Narcotics laws, Title 26 U.S.C. Secs. 4705(a), 4704(a), and Title 21 U.S.C. Sec. 174. The first three counts involved a transaction on October 14, 1961, between defendant and Butch Hudson, Bill Gray and David Garrett. The second three counts involved a transaction on October 18, 1961, between defendant and David Garrett, and the last three counts involved a transaction on October 21, 1961, between defendant and Butch Hudson, Bill Gray and David Garrett. Garrett was a police officer with the Baltimore City Police Department who had been assigned to do undercover work as a Federal Agent with Federal narcotics officers in the District of Columbia. Hudson and Gray, residents of Richmond, Virginia, were "special employees" of the narcotics office who were actually government informers quite familiar with dope addicts and the dope traffic. Defendant said they were both addicts. Garrett claimed he didn't know if they were (TR 47). Butch said he had been a user for about six years but had stopped in January or February of 1961 (TR 106). Gray admitted being with Butch at drug pads such as "Ethel and Naps" where drugs were sold and used, but denied that he was an addict (TR 151-13).

Defendant, Maurice Lyles, freely and frankly admitted the three transactions involved, but defended on the ground that on each occasion he had procured the drugs as a favor for his friend, Butch, and never acted as a "dealer" or "seller". The defense was on two principal

grounds, one; that he was acting as agent for the Federal Agent Garrett, through his two friends, who were acting under Garrett's directions, and not as agent for the seller, and second; that he had been entrapped into committing the offenses.

Except for a few discrepancies as to details, the testimony of the defendant himself corroborated the government's proof of the three transactions. The principal differences lay in the extent of the past relationship between defendant and the two informers, Butch Hudson and Bill Gray, and the amount of persuasion used by them and Garrett upon the defendant to procure the narcotics.

The testimony of defendant, Maurice Lyles, disclosed that he is 35 years of age, married, and was employed as a waiter at the National Press Club. He had been a narcotics addict for about 15 years and had made a couple of efforts to break the habit, but without success. He had even written the hospital authorities at Lexington for admittance (TR 193).

He first met Albert Hudson, known as "Butch", in the latter part of 1960 at a house in the District which was a"dope pad" operated by "Nap and Ethel" (TR 179-180). He was introduced to Butch by Buck Smith. Buck and Butch had given defendant a lift home in Buck's car (TR 181).

Thereafter, defendant saw Butch Hudson a number of times. He saw him at 14th and T when he was with Bill Gray and they told him they were just passing through from Richmond and wanted to know where they could purchase narcotics. They

only had about $6 between them, and defendant gave them the name of a supplier. They apologized for not being able to "turn me on", meaning share the narcotics with defendant. (TR 182-183). Defendant also saw Butch at Nap and Ethel's again when he was there with Buck to get drugs, and on that occasion defendant lent his own narcotics outfit to Butch for his use. Butch and Buck again gave him a lift home. Butch was complaining about the general situation at Nap and Ethel's such as the high prices, the "short merchandise", and other disagreements, and Butch asked defendant if he could give him the names of any other dealers or suppliers. Defendant told Butch that he didn't know of many that Butch didn't already know about (TR 185).

Defendant also saw Butch in May of 1961 when defendant was down in Richmond playing the drums with a band. Defendant was in need of drugs and he was able to locate Butch through Bill Gray. At that time, Butch looked shabby, he told defendant that he had been unemployed and didn't have any money and he also needed drugs. Defendant agreed that if Butch could find a supplier for him he would give some drugs to Butch. Butch did locate a supplier and defendant made a buy and gave Butch part of it (TR 186-187, 212-215).

Defendant saw Butch on a number of later occasions in Washington; once, again with Buck, at the Dunbar Hotel. Butch was "sick" and badly in need of drugs. Because of the help he had given defendant in Richmond defendant found some morphine for him. On another occasion, which was prior to

October 14, 1961, defendant saw Butch and Bill Gray at 14th and U Streets, and on that occasion Butch told him that he didn't know anyone around who had narcotics and he asked defendant to find a supplier for him so he would have a supply when he came here (TR 190-191).

On October 14, 1961, the date of the first transaction involved in the indictment, defendant said he did get a phone call from Butch who reminded him of their previous conversation and asked if he could find him and his friends some drugs. Butch said that all three of them were "sick" and needed drugs; that they had been working in the tobacco factory and after the long ride from Richmond they were tired and sick. Defendant agreed to try to find a supplier for them, and Butch said that if he could they would take care of him also (TR 191-192, 219).

On this first occasion, October 14th, Butch had introduced Garrett to defendant as a boy who worked in the tobacco factory with him in Richmond (TR 217). It was understood that if Butch needed drugs thereafter and couldn't get to Washington himself, he would send either of the other men (Bill Gray or Garrett) to get them for Butch (TR 222-223, 231).

On the second occasion, October 18th, defendant said he had received a call from Garrett and had met him at the High's store, and that he went and got some drugs and brought them back to Garrett for Butch. Defendant said he did not consider these transactions as "sales"; he was merely helping his friend Butch and Butch's friends to get the drugs

they needed when they were sick (TR 233). He said he couldn't tell whether Garrett was "sick" on the 18th, but that he sounded "anxious" and that he was "anxious"; he had said that he was late, that he had come by bus and he was tired and he had to hurry and get back to Richmond. Defendant assumed that the reason he came was because he was sick and that they were all sick and needed drugs. Defendant said the reason he was doing this was because Butch was his friend, and he did this as a favor for Butch since he had helped him out in Richmond (TR 192, 229-233).

On October 21st, the date of the third transaction, defendant received a call from Butch who said that he had had a blow-out on his way up from Richmond and was about an hour away from Washington. Butch called him again later in the day, and this was the time that defendant had a cold and even came out in the rain to meet him (TR 235). Gray and Garrett were with Butch again and defendant gave them directions on how to get to various parts of the city until a dealer could be located (TR 234-235).

Defendant denied having been first introduced to Butch by Buck Smith at the Dunbar Hotel, and denied that Buck had then told Butch that defendant would take care of him or fix him up whenever he needed drugs (TR 239-240).

With respect to the three transactions, defendant testified that he did not know whether the narcotics he had obtained for Butch were taken from the original stamped package, or from what they were removed before being delivered

to him by the supplier (TR 193-198).

Defendant admitted being a user, but said he was not a "seller" or "dealer" in narcotics, and had never been a seller (TR 198).

On cross examination defendant admitted that he was the same person who had been convicted of receiving stolen property in 1954, and had been convicted of possession of drugs in Chicago in 1953. He also admitted having been convicted in the District of Columbia in May of 1956 for violation of the Federal Narcotics laws (TR 204-206).

Three witnesses were called in rebuttal by the Government; the first was Bill Gray who claimed that he had not seen the defendant, as defendant had testified, on May 7, 1961, in Richmond (TR 244); the next rebuttal witness was Butch Hudson who said that he had first met defendant at the Dunbar Hotel and had been introduced to him by Buck Smith who had told him that any time he came across or met Maurice that he could "cop" from him, meaning obtain narcotics from him, and he said that on that occasion defendant had sold Buck narcotics (TR 245). On cross examination, he was asked why he had not testified in his original testimony about the alleged sale by defendant to Buck at the Dunbar Hotel, and he replied that he had not been asked about it (TR 246).

Garrett was also recalled on rebuttal and he stated that the reason defendant was not arrested until March of 1962, although the three transactions had occurred some four months previously, was because he was working on other cases and it

would have hurt his undercover activity and disclosed his identity (TR 247).

The Court's charge to the jury covered the defenses of agency (TR 306-307) and entrapment (TR 307-310). The jury returned a verdict of guilty on all counts, and defendant was later sentenced to 10 years imprisonment on each count, all to run concurrently. This appeal is taken from that conviction.

STATUTES

Title 26, U. S. Code

"§ 4704(a). It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

"§ 4705(a). It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

Title 21, U. S. Code

"§ 174. Whoever fraudulently or knowlingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT OF POINTS

1. The Court erred in excluding evidence which would combat the presumption arising from possession.

2. The Court erred in explaining the purpose of the narcotics laws to the jury, thereby indicating that use of drugs by defendant characterized him as dangerous and an evil influence.

3. The Court erred in permitting testimony of Government witnesses that possession, per se, was illegal and in characterizing defendant generally as a dealer in narcotics prior to the offenses on trial.

4. The Court erred in permitting rebuttal testimony by the Government concerning a separate unrelated sale by defendant for which he was not on trial.

5. The Court erred in refusing to sustain the defense claim of entrapment as a matter of law.

SUMMARY OF ARGUMENT

The terms of the narcotics statutes involved herein make it plain that possession is only prima facie evidence or constitutes an evidentiary presumption of guilt. The Court refused to permit testimony by defendant and evidence that would show that defendant did not have knowledge of any violation of law. This was relevant and probative to answer the presumption.

The Court in its charge to the jury did not limit itself to the terms of the statute or an explanation of the statute, but went far beyond in discussing the purpose of the statute which was prejudicial to defendant since under the admitted facts he was a user of narcotics and the charge given by the Court indicated that a user was dangerous and an evil influence in the community.

Defendant was further prejudiced by testimony of two Government witnesses that possession of heroin alone was illegal and by testimony of a Government witness that defendant was known as a dealer in narcotics prior to the offenses charged herein. This evidence effectively dispelled the presumption of innocence to which he was entitled.

The Government's rebuttal testimony was highly prejudicial to defendant and was unnecessary since it disclosed for the first time an unrelated sale for which he was not on trial.

The Government's evidence herein showed only that

defendant was willing to procure drugs out of sympathy and friendship for a fellow addict and because of past favors done him. This was not sufficient proof that he was willing to procure drugs for anyone who asked for it as the law requires.

ARGUMENT

I

THE COURT ERRED IN EXCLUDING EVIDENCE COMBATTING THE PRESUMPTION ARISING FROM POSSESSION.

The second, fifth and eighth counts charged defendant with purchasing, selling, dispensing and distributing, not in the original stamped package, and not from the original stamped package, a narcotic drug,. etc. The statute (Title 26, Sec. 4704(a) U. S. Code) also states that "the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection".

The third, sixth and ninth counts of the indictment charged that defendant facilitated the concealment and sale of heroin after it "had been imported, with the knowledge of defendant, into the United States contrary to law". This statute (Title 21, U.S.C. Sec. 174) also states that defendant's possession of the drug "shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury".

Defendant's possession of the unstamped drug on the three transactions herein, which is admitted, is therefore held to be "prima facie" evidence under the first statute, and constitutes a presumption of guilt under the second. However, the latter is a rebuttable presumption (Jackson v. U. S., 102 U.S. App. D.C. 109, 250 F. 2d, 772; Cellino v. U. S. (C.A. Cal. 1960), 276 F. 2d 941), and, of course, "prima

facie" proof can be met and overcome by proof to the contrary, (Goode v. U. S., 80 U.S. App. D.C. 67, 149 F. 2d. 377). In either of such events it becomes a question for the jury, but neither statute requires the jury to convict on possession alone.

Defendant attempted to introduce evidence that he had no knowledge of whether the drug had been obtained by his supplier through a written prescription, or whether it was removed from a properly stamped package when he obtained them from the supplier (TR 193-198, 257-261, 284-285). Defendant had previously attempted to show these facts through the Government's witnesses, but the Court sustained the Government's objections in each instance. (TR 50-55, 69-73, 122-125, 151-19-151-22). Defendant's trial counsel argued that if defendant was merely a "conduit" for transferring the drugs from a legal supplier to a legal recipient (the Government agent) no guilt would attach to defendant. He likened the situation to a doctor leaving some drugs for a patient, or a nurse administering or handing a narcotic to a patient on a doctor's orders (TR 70-74, 194-197).

Certainly, with respect to the third, sixth and ninth counts, (Title 21 U.S.C. Sec. 174), the defendant should be permitted to fully explain the identity of his supplier, how he obtained the drugs from him, the condition of the drugs when he got them, and the container from which they were taken. The jury could then determine whether the circumstances were such that would lead defendant to believe the drugs had not

been imported contrary to law. The refusal to permit such explanation makes the presumption not rebuttable, but conclusive. Since this entire line of questioning was cut off by the Court at the Government's objection, defendant had no possible way of defending against the presumption. Suppose, for example, if defendant was permitted to so testify, he testified he was told by the supplier that the drugs had been imported legally, or suppose defendant testified he obtained them from a physician who had legal possession (e.g., Goode v. U. S., supra; U. S. v. Ah Hung (D.C.N.Y.) 243 F. 762). Under the Government's and the Court's line of reasoning, this testimony would also have been excluded as irrelevant (TR 51-53). Yet the statute requires that <u>defendant have "knowledge" that the drug had been imported contrary to law</u>. Although such knowledge may be presumed from defendant's possession, the jury has a right to acquit and disregard the presumption without any evidence or explanation. Certainly, therefore, any evidence, either affirmatively showing that defendant was led to believe the supplier had legal possession, or even negative evidence that defendant was without knowledge of how the supplier obtained possession, is both relevant and probative under the terms of this statute on which defendant was indicted.

II

THE COURT COMMITTED PREJUDICIAL ERROR IN ITS CHARGE IN ITS EXPLANATION OF THE PURPOSE OF THE STATUTES INVOLVED HEREIN.

The two statutes on which defendant was indicted

deal with the receiving, concealing, buying, selling, dispensing, distributing, or facilitating the transportation of narcotic drugs. Consequently, all of the cases make it clear that the use of drugs, per se, is not a crime nor is it a crime to be a drug addict. The Trial Court therefore properly included in its charge to the jury that:

> "It is not a crime to be a drug addict, nor is the use of drugs a crime" (TR 298).

However, in this case in which the defendant freely admitted having been a drug addict for over 15 years and in which both the prosecution and defense testimony disclosed numerous meetings at drug pads and frequent use of drugs, it is respectfully submitted that the Trial Court committed prejudicial and reversible error by including in its charge an extensive comment on the purpose of the narcotics laws, the thrust of which went far beyond the terms of the statute and completely nullified the previous proper instruction. The Court said:

> "As you have just heard, the defendant is charged with violations of the law relating to narcotics. Narcotics have a recognized and legitimate use in medicine. On the other hand, their use, when not under the supervision of a physician, is regarded as dangerous and as susceptible of an evil influence. For this reason traffic in narcotics is regulated by law so that they may be available for medicinal purposes under the supervision of a physician but in order that they may not be obtainable for elicit (sic) and illegitimate uses. Accordingly, sale and purchase of drugs are permitted only pursuant to a doctor's prescription. Further safeguard is prescribed by law in that packages containing narcotics lawfully sold or dispensed must bear an Internal Revenue stamp, and all sales of narcotics must

> be made in and from the original stamped package. All traffic in narcotics, outside of the channels prescribed by law, as I have just indicated, is elicit (sic) and because of its detrimental effect on the community is regarded as criminal" (TR 302). (Emphasis supplied)

In making his comment the Trial Judge may have had in mind the remarks of Mr. Justice Frankfurter in the Gore case (357 U.S. 386) quoted in Smith, infra, concerning the intent of the narcotic statutes, but as stated by this Court in Hansford v. U. S., 112 U.S. App. D.C. 359, 362, 303 F. (2d) 219, "a Court opinion is not an instruction to a jury".

And, where the language of the statute is unambiguous it is error to refer to its legislative history (U. S. v. Garnes (C.A. N.Y. 1958) 258 F. 2d 530, Cert. denied, 79 Sup. Ct. 651, 359 U.S. 937, 2 Law Ed. 2d 637).

In Maynard v. U. S., 94 U.S. App. D.C. 347, 215 F. 2d 336, this Court quoting from other cases stated, "Even in criminal cases, it is held as a general rule that where the law governing a case is expressed in a statute, the Court in its charge should use the language of the statute". (See also Smith v. U. S., 106 U.S. App. D.C. 26, 269 F. 2d 217).

It is respectfully submitted that the impact of this comment upon the jury was such as to deprive the defendant of a fair trial since he admitted being a user of narcotics, for which he was not on trial, and as a user he was pictured by the Court before the jury as one who was "dangerous and susceptible of an evil influence," and one who exercised a "detrimental effect on the community".

III

DEFENDANT WAS PREJUDICED BY IMPROPER TESTIMONY OF GOVERNMENT WITNESSES.

It is respectfully submitted that defendant was further prejudiced in receiving a fair trial by reason of three improper answers made by separate Government witnesses.

When special agent Garrett was testifying, he was asked by defendant's counsel on cross examination:

"Q Now, you don't know what container Mr. Lyles got these drugs from while he was in the kitchen, do you, or while he was in the house?

"A No, sir.

"Q Of course you don't because you weren't there.

"A That is correct.

"Q So you don't know whether the container from which he got these drugs was obtained initially pursuant to a written prescription, do you?

"A I know that the possession of heroin is illegal, period.

"Q Thank you for that knowledge. But, if you would answer my question " (TR 50).

On the direct examination of Government witness, Butler, the Treasury Department Chemist, the prosecutor asked him:

"Q Now, can you tell us whether heroin is a contraband?

"A Yes sir; heroin is contraband" (TR 172).

During the discussion on the instructions the Trial Judge commented on the latter question and answer as follows:

"The Court: Actually, I think that if you had objected at the time Mr. Caputy asked Dr. Butler whether it was contraband, I think I would have sustained your objection. I don't think it is any of Dr. Butler's business to decide whether or not it is contraband or not. He can only decide whether it is heroin" (TR 258).

It is respectfully submitted that the failure of defendant's trial counsel to object in these two instances should not have prevented the Court from striking the testimony on its own initiative. These answers indicated that possession alone of heroin was illegal, yet the only reported case found on the point says it is not (Title 18, Sec. 1401, U. S. Code, U. S. vs. Contrades (D.C. Hawaii, 1961) 196 F. Supp. 803).

A third incident was also prejudicial. Government witness Butch Hudson made another unresponsive answer to one of defense counsel's questions on cross examination (TR 116):

"Q You know Mr. Lyles is an addict, don't you?

"A I knew him as an addict.

"Q Yes. You know he is an addict, don't you?

"A I knew him as an addict, and knew him as a dealer, too.

"Q You answer my question. You knew him as an addict; right?

"A Yes, sir."

Although defendant's trial counsel did not object or move to strike this answer which was completely unexpected and unresponsive, it is doubtful whether such action by counsel would have done any good to erase it from the minds of the jury.

When the Government witness testified that defendant was known to him as a dealer, any presumption of innocence to which he was entitled on these charges undoubtedly vanished from the case at that point.

IV

THE GOVERNMENT'S REBUTTAL TESTIMONY WAS PREJUDICIAL TO DEFENDANT.

On defendant's direct examination he had testified that he saw Butch Hudson with Buck Smith at the Dunbar Hotel in Washington, and because Butch was "sick" and because of the favor Butch had done for the defendant in Richmond, he went and got some morphine for him. Defendant stated that this was around September of 1961, about the beginning of the winter football season (TR 190).

On cross examination the prosecutor asked defendant whether it wasn't a fact that he had first met Hudson at the Dunbar Hotel when Buck Smith was present, and defendant denied that that was their first meeting. The prosecutor then asked defendant whether it wasn't a fact that he was introduced to Butch by Buck Smith at the Dunbar Hotel and that Buck told Butch that defendant "would take care of him

or fix him up, that he could cop from you". Defendant denied that conversation (TR 239-240).

Thereafter Butch Hudson was recalled on rebuttal and testified that he first met defendant at the Dunbar, and was introduced to him by Buck Smith, and that Butch had said that anytime he came across or met defendant he could "cop" from him, or obtain narcotics from him. This was certainly proper rebuttal and effective rebuttal, although its relevancy to the issues is questionable except possibly as it may relate to predisposition. However, the prosecutor then went much further and entered prejudicial ground by the following (TR 245):

"Q All right. Were any narcotics sold in that room on that occasion?

"A Yes, sir.

"Q And sold by whom and to whom?

"A Lyles sold Buck Smith narcotics."

Defendant's counsel, suddenly faced with this entirely new issue at this late stage of the trial, did not object, but even if he had, the damage had already been done. All he could do was to bring out that this alleged sale had not been testified to previously by Hudson on his direct examination (TR 246).

Since Buck Smith was not produced as a witness by the Government, nor was his absence explained, and since defendant had no way of counteracting this testimony, when the trial was almost over, except by his own unsupported

denial, it is respectfully submitted that the prosecutor committed prejudicial error in going beyond any evidence necessary to show predisposition. The situation was quite similar to that in the Hansford case, supra, the only distinction being that in Hansford the alleged unrelated incident had occurred nine months prior to the charge on trial and in this case it occurred about one month before the charge on trial. However, the point is that the testimony was extremely damaging, and was unnecessary either for impeachment purposes or as direct evidence of predisposition.

V

THE DEFENSE OF ENTRAPMENT SHOULD HAVE BEEN SUSTAINED AS A MATTER OF LAW.

A reading of the Statement of Facts herein shows beyond any reasonable doubt that there was a close relationship existing between the two Government informers and the defendant, and that they were friends, on a first name basis (TR 43). The special Federal Agent Garrett was introduced to defendant as a friend and co-worker of theirs from Richmond (TR 57). Butch Hudson had known defendant for about three years (TR 103). Butch had been at Nap and Ethel's dope pad and purchased drugs there (TR 136), but he said defendant was not there at the same times.(TR 105). Butch admitted being a user but claimed he had thrown the habit in January o' February, 1961, and said he didn't remember when he had last used narcotics in the District of

Columbia (TR 106-107). Butch was paid $10 per day, plus expenses, to do undercover work (TR 108). He confirmed that he was unemployed in May 1961 (when defendant said he had seen him in Richmond (TR 112), but he claimed he hadn't seen defendant in Richmond (TR 113). He admitted lying to defendant when he set up their first meeting on October 14 (TR 114-115, 118), and he admitted saying he was "sick" and suffering from painful withdrawal symptoms when he asked defendant to obtain drugs for him and his companions (Gray and Garrett) (TR 115). He later, on re-direct examination, attempted to deny this testimony, saying he misunderstood the question - but it was obvious he had not (TR 143-145). Butch said he wouldn't call defendant a "friend" because he didn't see him daily (TR 140), but even though he wasn't a "friend", he admitted he had told him he "was insane for getting married" (TR 140-141).

William Gray was also a frequenter of Ethel and Nap's dope pad along with his friend Butch Hudson but couldn't "recall" whether he was ever there when defendant was present (TR 151-12). He claimed he was never an addict (TR 151-13). When asked whether Butch told defendant on October 14 that he was "sick", he replied "No, sir, not on the phone he didn't" (TR 151-18).

There seems to be no doubt that defendant procured the drugs on October 14, 18 and 21 because of his close friendship or relationship with Butch Hudson and Bill Gray based on their common experiences in the drug trade and

because he knew or believed they were "sick" and suffering the great physical and mental pain of withdrawal symptoms, with which he was quite familiar. The aforesaid facts, the use of Government money and transportation, and reward to defendant in the form of sharing the narcotics with him, similar to the facts in Smith v. U. S., 110 App. D.C. 345, 293 F. 2d 532, and Earl Johnson v. U. S., (U.S.C.A.-D.C. 1963) 317 F. 2d 127, at the least made the issue of entrapment one for the jury.

However, the oft-quoted opinion of Judge Learned Hand in U. S. v. Sherman, 200 F. 2d 880, 882-883, which defines the issues of fact in entrapment states that the defendant must be "ready and willing without persuasion", and, was he "awaiting any propitious opportunity to commit the offense". The learned judge further explained that the prosecution must "satisfy the jury that [defendant] did not need any persuasion but that he stood ready to procure heroin for anyone who asked for it".

None of the reported cases known to counsel have disapproved the emphasized language and so it is believed that, if this is a correct statement of the law, the Government's burden of proof must go beyond the showing made here that defendant was willing to and did procure drugs for a friend and fellow addict whose craving and need for drugs was known to defendant, and whom defendant wished to repay for past favors.

The proof was not sufficient to show that

defendant was willing to procure drugs for anyone who asked for it, nor that he was awaiting any propitious opportunity to procure drugs for one to whom he was not known or indebted. (See dissent by Judge Edgerton in Fletcher v. U. S., 111 U.S. App. D.C. 192, 295 F. 2d 179).

It is therefore submitted that the defense of entrapment was not met by proof beyond a reasonable doubt and the Court should have directed a verdict of acquittal.

CONCLUSION

It is respectfully submitted that upon the facts and authorities cited herein, defendant should be acquitted, or at the least, awarded a new trial.

Respectfully submitted,

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Appointed by this Court.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,977

MAURICE B. LYLES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
DAVID EPSTEIN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee the following questions are presented on appeal:

1.) Where appellant's testimony as to entrapment was contradicted by the Government's witnesses, was the trial court in error for not finding entrapment as a matter of law and instead submitting the issue to the jury, under proper instructions, for resolution?

2.) Were the answers of several witnesses, without objection and in direct response to questions posed by both parties, plain error and sufficient grounds for reversal and a new trial?

3.) Whether the trial court denied appellant a fair trial by foreclosing testimony on immaterial matters?

4.) Were the court's instructions to the jury proper?

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,977

MAURICE B. LYLES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

Counterstatement of the Facts

By indictment filed on June 4, 1962, appellant was charged with nine counts in violation of the federal narcotics laws (26 U.S.C. 4705(a), 4704(a), and 21 U.S.C. 174). He was charged with three-count violations for criminal acts occurring on each of the following dates: October 14, 18, and 21, 1961. After a trial by jury and a verdict of guilty, appellant was sentenced, by judgment and commitment filed on June 14, 1963, to a period of imprisonment of ten years on each count, the mandatory minimum under the statutes because of his previous narcotics convictions. The sentences are to run concurrently. This appeal followed.

The Trial

At trial the Government presented the testimony of six witnesses. David L. Garrett, a Baltimore City Police Officer, temporarily assigned to the Federal Bureau of Narcotics as an undercover agent, testified as to his observations during the three separate days which involved all of the criminal acts charged in this case (Tr. 3-81). Albert Hudson and William Gray, special employees of the Federal Narcotics Bureau, testified as to their presence on two occasions, October 14 and 21 (Tr. 82-147, 148-151-26). Two other persons, regular agents of the Bureau, supplied some minor corroboration as to the various transactions (Tr. 151(26)—169). Dr. William P. Butler, a chemist with the Treasury Department, established that the capsules, which were purchased from appellant, all contained heroin, a narcotic drug (Tr. 169-179).

The Sale of Heroin on October 14, 1961

Arrangements were made by Hudson on the telephone at 12:20 p.m. to meet appellant at 9th and F Streets, Northeast (Tr. 5-6). Officer Garrett recounted that he, along with Hudson and Gray, all drove to the location in Gray's car and met appellant at approximately 12:48 p.m. He entered the vehicle and a discussion ensued. Hudson asked appellant if he could obtain narcotics capsules for one dollar a pill, and Officer Garrett then gave him thirty dollars.[1] Appellant left the car, was gone for ten minutes, and returned with a cigarette wrapper containing eighteen capsules; appellant had retained two capsules from those purchased. A discussion followed about the possibility of Garrett alone purchasing capsules from appellant in the future; it was agreed that this was possible (Tr. 4-12, 46). Appellant then left the vehicle because "he saw two junkies on the corner who

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[1] Marked Government funds were used in the transactions. (Tr. 17, 27).

might want to score," that is, might want to buy some heroin (Tr. 12).

Hudson, who had made the phone call to appellant setting this meeting, also testified and in the main corroborated the testimony of Officer Garrett. Hudson pointed out that the capsules were given by appellant (Tr. 82-89) to Officer Garrett, who placed them in his pocket. The testimony of Gray, also present at this purchase, was essentially cumulative.

The Sale of Heroin on October 18, 1961

On October 18, 1961, Officer Garrett placed a phone call to appellant and made arrangements to meet him alone at the corner of 8th and F Streets, Northeast. After meeting at a High's store, Garrett asked, "could he (appellant) do me any good." (Tr. 15-18.) Garrett was directed to walk to another location and appellant, who then left for about twelve minutes, returned saying he could only get forty capsules, not fifty. Forty dollars were given to appellant who instructed Garrett to meet him at yet another location. At fifteen minutes past noon appellant reappeared with thirty-six capsules, stating that he had kept four for himself. Appellant then advised Garrett that Hudson should call the next time "so we wouldn't have to walk around and kill a lot of unnecessary time. (Hudson) could call him (appellant) and let him know the number of capsules we wanted, and he would have them ready when we arrived." (Tr. 19-23.)

The Sale of Heroin on October 21, 1961

Arrangements were made by Hudson on the telephone to meet appellant at 8th and F Streets, Northeast (Tr. 94). Officer Garrett, accompanied by Hudson and Gray, then went to that location, where they met appellant, who explained "his man hadn't showed," which apparently indicated he could not complete the narcotics sale at that point. (Tr. 29-32, 65.) The threesome were directed by appellant to drive to 60th and Deane Street, Northeast.

Appellant, at that corner, asked for some money, and was given fifty dollars. Appellant was gone for about forty-five minutes and then returned at 12:40 p.m., accompanied by another male. The two held a conversation about a half-a-block from the three men in the car (Tr. 33-35). The other man went away, then returned, and Hudson saw their hands meet but did not see any object exchanged. (Tr. 99) Appellant then returned to the automobile, gave twenty-seven capsules to Hudson, withheld three capsules for himself, and returned ten dollars in change. Hudson immediately turned the capsules over to Garrett. On the drive back to appellant's home, appellant tried to impress on the three that arrangements for future sales should be made by phone and payment could be mailed (Tr. 35-38, 67).

The Defense

Appellant testified, corroborating in the main the three separate transactions. He attempted to show a long and continuing relationship with Hudson and that the sale of narcotics was made because of the latter's importuning. He suggested that the sales were made because Hudson had, on an occasion, provided narcotics to appellant when in need of drugs (Tr. 179-194). Hudson denied this relationship (Tr. 103-107, 110-115, 245).

STATUTES INVOLVED

Title 21 U.S.C. § 174 provides:

> *Same: penalty: evidence.*—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not

> less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.
>
> For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

Title 26 U.S.C. § 4707(a)—General requirement provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 26 U.S.C. § 4705(a)—General requirement provides:

> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

SUMMARY OF THE ARGUMENT

The trial court properly submitted the issue of entrapment to the jury. The court was correct in not finding entrapment as a matter of law where appellant's

testimony, dealing with the closeness of his relationship with one of the special agents and certain circumstances of the sales in the instant case, were contradicted in most respects by the Government witnesses.

Appellant did not voice any objection to the testimony which he now finds offensive, and he is foreclosed from raising the point on appeal. Further, the testimony was responsive to questions posed by appellant. The other testimony, to which appellant now objects, was proper rebuttal, contradicting statements made by appellant on direct examination.

Appellant was not denied a fair trial because the trial court denied him the opportunity of presenting testimony of immaterial matters. The testimony appellant proffered was that he did not know whether the narcotics he bought from a supplier and later sold to Officer Garrett and his associates came from an original stamped container. Such testimony would not, in the circumstances of this case, assist in explaining possession and was not even remotely probative.

The court's instructions to the jury were proper.

ARGUMENT

I. The Trial Court properly submitted the issue of entrapment to the jury where the testimony was contradictory.

(See Tr. 113-114; 142-143; 151(18); 191-192; 244-247; 306-307.)

The District Court's instructions on entrapment were full and complete. Aside from these remarks, the court also instructed the jury, at appellant's request, on a theory of defense which argued that if appellant established an agency relationship with Officer Garrett in securing narcotics for him, appellant was not guilty of violating the statute (Tr. 306, 307). Such an instruction provided the jury with an additional ground for acquittal, which it chose not to accept.

Appellant corroborated, in the main, the Government's evidence as to the transactions, but he argues that his previous acquaintance with the two special agents, Hudson and Gray, particularly the former, made him readily susceptible to entrapment. Appellant further suggests that he secured heroin because Hudson had obtained narcotics for him in the past as a favor. Also, that on October 14, Hudson said he was suffering from withdrawal symptoms and needed heroin (Tr. 191-192). This testimony is directly contradicted and denied by both Hudson and Gray (Tr. 113-114; 142-143; 151(18)). Furthermore, they deny specific aspects of the testimony which tend to show a close relationship with appellant (Tr. 244-247).

Appellant's readiness and, indeed, eagerness to sell narcotics is manifest. After arrangements which were made by Hudson on the telephone, where Hudson said nothing about suffering from withdrawal symptoms, appellant readily met the threesome, Hudson, Gray, and Officer Garrett on October 14. A sale was made. Appellant, as in all the subsequent transactions, kept some of the capsules as a commission for securing the heroin. Arrangements were made for Officer Garrett to make later transactions alone, and then appellant hurriedly left the automobile because he noticed some addicts on the street who needed his services in order to buy narcotics.

On October 18, Officer Garrett telephoned appellant, met him alone, and another sale was made. Appellant suggested that to economize on time in future deliveries, advance calls should be made by Hudson. The same concern for a smooth business operation is shown on the third sale date, October 21, for appellant suggests that arrangements by phone and payment through the mail will allow a more ready handling of the transactions. The sales to Officer Garrett belie solicitude for Hudson's welfare as the major reason for these narcotics transactions.

In *Denison* v. *United States*, No. 17769, decided October 17, 1963, in an almost identical factual situation,

this Court stated at p. 3, slip opinion, "an ample basis was established to support the jury's determination that appellant was ready and willing to participate in the sordid venture to obtain 6 capsules of heroin for herself. We are unanimous in our view that there was no entrapment as a *matter of law*."

Assuming *arguendo* that appellant's testimony itself was sufficient to establish entrapment, that testimony is contradicted by several of the Government's witnesses. *Cf. Sherman* v. *United States*, 356 U.S. 369 (1958) (uncontradicted testimony of the prosecution's witnesses established entrapment as a matter of law.) Defense testimony alone does not have the effect of establishing entrapment as a matter of law. *Masciale* v. *United States*, 356 U.S. 386 (1958). The jury is the proper vehicle for evaluating the facts, resolving contradictions, and determining whether the Government's action was a "trap for the unwary innocent" or "a trap for the unwary criminal." See, *e.g.*, *Masciale* v. *United States*, 356 U.S. 386 (1958); *Sorrells* v. *United States*, 287 U.S. 435 (1932); *Smith* v. *United States*, 110 U.S. App. D.C. 344, 293 F.2d 532 (1961); *Trent* v. *United States*, 109 U.S. App. D.C. 152, 284 F.2d 286 (1960), *cert. denied*, 365 U.S. 889. The District Court acted properly in submitting the issue to the jury. See, *Johnson* v. *United States*, 115 U.S. App. D.C. 63, 317 F.2d 127 (1963).

II. The isolated responses of several witnesses to questioning were not error.

(See Tr. 50, 116, 172, 198, 232, 240)

1.) *During Direct Examination by Appellant and Prosecutor.*

Appellant seeks to assign error to the responses of several witnesses during cross examination conducted by his counsel and to the reply of the chemist to a prosecution question. No objection was made at trial to these answers nor was the court requested to instruct the jury

to disregard the remarks. Counsel cannot become a passive instrument in the courtroom, fail to voice objections, and, on the basis of isolated statements which were at most harmless error, seek a new trial. It is well settled that for this Court to review error in the admission of testimony objection must be stated at trial. *E.g.*, *White* v. *United States*, 114 U.S. App. D.C. 238, 314 F.2d 243 (1962); *Harris* v. *United States*, 112 U.S. App. D.C. 100, 299 F.2d 931 (1962); *Fuller* v. *United States*, 53 U.S. App. D.C. 88, 91, 288 F. 442, 445 (1923).

Two of the remarks which appellant now finds offensive were made in response to inartful cross-examination by appellant. After Officer Garrett had testified that he did not know where appellant secured the drugs, counsel inquired,

"So you don't know whether the container from which he got these drugs was obtained initially pursuant to a written prescription, do you?

The officer replied to this redundant questioning, "I know that the possession of heroin is illegal, period." (Tr. 50)

Another witness, Hudson, was repeatedly asked,

Q. "You know Mr. Lyles is an addict, don't you?"
A. I knew him as an addict.
Q. Yes. You know he is an addict, don't you?
A. I knew him as an addict, and knew him as a dealer, too.

Appellant then asked the same question for a third time, and again received a "yes" reply. (Tr. 116.) With this repeated questioning the witness could hardly have divined counsel's meaning. The response, in context, was responsive.

During direct examination Dr. Butler, the chemist whose qualifications as an expert were established, was asked.

Q. Now, can you tell us whether heroin is contraband.
A. Yes sir; heroin is contraband (Tr. 172).

Within the area of his expertise, narcotics drugs, this was certainly an item of information known to him. In any event, this Court in *Scott* v. *United States*, 115 U.S. App. D.C. 208, 317 F.2d 908 (1963), held that Dr. Butler's stating that opium was grown only outside the United States, where no objection was made, was not reversible error.

All of the offending remarks can, at the very most, be considered only as harmless error. Rule 52(a) Fed. R. Crim. P. Indeed, the court's instructions to the jury covered in detail and with clarity the elements of the crime and the proper manner to consider the case. Additional instructions were not requested. Any possible error was cured by the instructions taken as a whole.

2.) *During Rebuttal Testimony*

On direct testimony appellant attempted to show a close relationship with special agent Hudson. Appellant indicated that Hudson's assistance in obtaining narcotics for him in the past was the impetus to appellant's returning the favor by securing heroin for Hudson and the other two men. Appellant denied, on examination by his own counsel, that he was ever a dealer in narcotics (Tr. 198). During cross examination he denied that a third person, on an occasion in the Dunbar Hotel wholly unrelated to the instant transactions, introduced appellant to Hudson as a narcotics dealer (Tr. 240). Appellant also denied ever dealing in narcotics (Tr. 232).

Hudson was recalled as a rebuttal witness. He testified that the first time he ever met appellant was at the Dunbar Hotel in Washington, D.C., thus contradicting appellant's account of a previous relationship in Richmond, Virginia. Hudson further recounted that appellant, at the time, was introduced to him as a source of narcotics and a sale of narcotics was made by appellant to a third party.

This line of questioning, where no objection was voiced, is not preserved for review on appeal. *Scott* v. *United States, supra; White* v. *United States supra; Harris* v.

United States, supra. Further, the questioning was entirely proper in contradicting appellant's denials of his trafficking in narcotics; rebutting his account of the relationship with Hudson, which was relevant to the issue of playing on a friendship to entrap; and to showing predisposition for making narcotics sales, a permissible showing where entrapment is raised. *Johnson* v. *United States*, 115 U.S. App. D.C. 63, 317 F.2d 127 (1963); *Cratty* v. *United States*, 82 U.S. App. D.C. 236, 163 F.2d 844 (1947). *Cf. Hansford* v. *United States*, 112 U.S. App. D.C. 359, 303 F.2d 219 (1962).

III. The Trial Court did not deny appellant a fair trial by foreclosing testimony on immaterial matters.

(See Tr. 230-231; 50-55, 69-73, 121-125, 151(19)-151(22), 193-198)

The Government's testimony showed that appellant sold heroin without a written order form [26 U.S.C. 4705 (a)] and not from a stamped package [26 U.S.C. 4704(a)]. The absence of a revenue stamp at the time the heroin was sold to Officer Garrett was, under the terms of the statute, *prima facie* evidence of the violation. Unexplained possession of heroin was sufficient to support a conviction of 21 U.S.C. § 174. Appellant admitted a sale without the order form or revenue stamps on October 14 (Tr. 230-231). He did not testify otherwise with regard to the other two transactions. The case was then submitted to the jury on two defense theories: entrapment and agency. The latter theory was that appellant was not guilty if he secured the heroin as an agent for Officer Garrett.

Appellant proffered to the court other testimony, which he argues, would have allowed him to rebut the presumption arising from possession of the heroin. The proffer was that appellant would testify that he did not know whether revenue stamps were on the container when he secured narcotics from his supplier (Tr. 50-55, 69-73, 122-125, 151(19)-151(22), 193-198). The argument to the jury would then be that there *may have been* stamps

on the supplier's container and appellant was only a conduit between a legal possessor of narcotics and a legal buyer, the officer (Br. 13-15). In view of the highly incriminating circumstances surrounding the transaction (i.e. the location, clandestine behavior, addiction of appellant, the convenient "death" of the vendor, and most importantly, appellant's commission—keeping capsules for himself) the proposed course of inquiry was correctly foreclosed by the court in the exercise of its discretion to keep the patently frivolous out of the case.

Even if appellant could show that the supplier's container had stamps, which appellant could not, this would not explain appellant's possession and sale, without stamps, to Officer Garrett. No testimony was proffered to show appellant was an unknowing conduit for the supplier. All the evidence was to the contrary. The trial court did not deny appellant a fair trial by not allowing him to present such immaterial testimony.[2] See, *Womack* v. *United States*, 111 U.S. App. D.C. 8, 10, 294 F.2d 204, 206 (1961), *cert. denied* 365 U.S. 859; *Herzog* v. *United States*, 226 F.2d 561, 565 (9th Cir. 1955) adhered to 235 F.2d 664, *cert. denied*, 352 U.S. 844. This proffer of testimony is wholly unlike the defendant's stating that he did not know the drugs were unlawfully imported into this country, testimony which the jury may consider as an explanation of possession. See, *Griego* v. *United States*, 298 F.2d 845 (10th Cir. 1962).

Even assuming *arguendo* that the trial court was in error for foreclosing this line of inquiry and argument, such testimony would have no bearing on three counts of the indictment (First, Fourth, Seventh) under 26 U.S.C. § 4705(a), sale of narcotics without a written order form. Under the doctrine of *Hirabyashi* v. *United States*, 320 U.S. 81, 85 (1943) this Court need not reach the question raised by appellant on the other counts where the sentences are, as in the instant case, of equal duration and con-

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[2] 1 Wigmore, Evidence § 27-29a (3d Ed. 1942)

current. *Chaifetz* v. *United States*, 109 U.S. App. D.C. 349, 288 F.2d 133 (1960) (*rev'd in part*, 366 U.S. 209).

IV. The trial court's instructions to the jury was proper.

(See Tr. 298)

The District Court, in the instructions to the jury, sought to carefully delineate the purport of the narcotics statute. Appellant voiced no objection at trial to these careful remarks by the court, and now, for the first time, objects and seeks a reversal. Failure to object to the instructions, at the time of trial, forecloses review on appeal. Rule 30, Fed. R. Crim. P., *e.g.*, *Duke* v. *United States*, 107 U.S. App. D.C. 382, 278 F.2d 262 (1960); *Ruffin* v. *United States*, 106 U.S. App. D.C. 97, 269 F.2d 544 (1959), *cert. denied*, 361 U.S. 865; *Villaroman* v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950).

In any event the remarks of the court, considered either in isolation or in the context of the court's entire instructions were correct. The remarks which appellant now finds offensive, were merely intended to delineate the difference between legitimate and illegitimate means of acquiring narcotics. The court indicated that the only legitimate means of securing narcotics were for medicinal purposes under the supervision of a physician and when distributed from the original stamped package. See, *Gore* v. *United States*, 357 U.S. 386 (1958). Narcotics sales outside of the prescribed channels are unlawful. During this portion of the instruction the court did not refer at all to appellant or mislead the jury into believing that appellant's admitted addiction or use of drugs was criminal. Indeed, the court specifically instructed the jury:

"It is not a crime to be a drug addict, nor is the use of drugs a crime (Tr. 298)." Appellant's addiction, at his request, was removed from the consideration of the jury, for the jury is presumed to follow instructions. *Delli Paoli* v. *United States*, 352 U.S. 232 (1957). The instructions

in no way suggested appellant's guilt and were entirely proper for clarification of the narcotics laws. The trial court has wide discretion in giving the charge and need not use the precise language of the statute. See, *Dranow* v. *United States*, 307 F.2d 545, 568 (8th Cir. 1962).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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